

State Bar of Michigan
Comments on ADM 2005 -12
May 24, 2006

Background

The State Bar appreciates that the Court has published proposed rules for comment to address several issues related to temporary guardianship proceedings over minors that had been raised by the Bar. The proposed rules, with minor technical correction, fully address the Bar's concerns.

After ADM 2005-12 was published, the Bar was contacted by the Michigan Probate Judges Association (MPJA) with concerns that were not brought to our attention when the drafts of the State Bar proposal were circulated. Representatives from both organizations have met several times to discuss ADM 2005-12. In April 2006, the Representative Assembly of the State Bar of Michigan recommended a technical change to the proposed MCR 5.402(C) and authorized the Bar to engage in discussions with stakeholders such as MPJA about whether the Bar could support modification of the proposed court rule. As a result of these discussions, the Bar wishes to inform the Court that the Bar would support several changes to the draft rule, if the Court deems them appropriate in light of MPJA's comments.

As made clear by the discussions, the State Bar and the MPJA are in agreement on many basic principles relevant to the rules at issue here. These include the principle that an ex parte guardianship should be issued only where there is good cause stated on the record, and the principle that parents should receive notice and a prompt opportunity to contest an ex parte guardianship. However, there continues to be an important point of difference between the State Bar and the MPJA on whether guardianship papers should be served, where possible, by personal service on the parents of the minor child that is the subject of the petition.

Personal Service on Parents - MCR 5.402(C)

The Bar originally proposed the change requiring personal service to ensure that parents whose children are potentially subject to guardianships are informed of those proceedings in a timely and effective manner. Practitioners who represent parents in these matters, especially parents of limited means, report that notice about ex parte guardianships is not consistently provided to parents. In addition, practitioners report that first class mail is not always a reliable way to provide notice, especially in fragile, low-income families where multiple adults may live in a household and retrieve the mail, where parents may be out of the home for periods of time, and where mail is sometimes stolen. Parents who are not staying at their usual residence for a variety of

legitimate reasons (medical treatment, work-related travel, short term incarceration, etc) are not necessarily uninterested or bad parents who do not care what happens to their children.

Personal service under the Michigan rules may be accomplished by certified mail, return receipt requested, (MCR 5.105(B)(1)(b)), as well as by hand delivery. Such personal service is already routinely used by pro se litigants in landlord-tenant proceedings where a money judgment is sought. If personal service is not effective, both ADM 2005-12 and the alternative attached language, permit a party to serve a parent by first class mail, or – if necessary – publication. If a parent appears at a hearing – regardless of the method of service – the Court may obtain a waiver of personal service under MCR 5.104(B).

The MPJA argues that personal service should not be required, but has proposed that perhaps adequate service would be possible if local probate courts themselves mailed guardianship orders and notice of how to file objections object to them to parents. This is already the practice in some courts. Although this option has the advantage of statewide consistency and would be a great convenience to petitioners, it does not itself the problems with first class mail.

When a party seeks a money judgment, the Michigan Court Rules require plaintiffs to serve defendants personally. A parent’s interest in his or her children is no less important than a defendant’s money. Indeed, parental interests are generally protected by the United States Constitution.

The MPJA has questioned whether ADM 2005-12 would interfere with the Court or petitioner’s obligations to incarcerated parents under MCR 2.004. Neither the proposed rule, nor the alternative language attached to these comments, would prevent parties or a court from complying with MCR 2.004. Personal service on inmates may be made by the person in charge of the institution. MCR 5.103(B). MCR 2.004 merely requires the Probate Court to ensure that an incarcerated parent knows about the proceedings and has the opportunity to participate by telephone. The goals of the proposed amendments and the goals of MCR 2.004 are the same: actual notice to the parent whose parental rights and interests are at stake.¹

MPJA’s proposal that Probate Courts themselves serve parents with guardianship orders by first class mail emphasizes simplified procedures and low costs, but at the expense of ensuring that parents are informed in a reasonably timely manner about

¹ See, e.g. MCR 2.004(E) (“The purpose of the telephone call described in this rule is to determine (1) whether the incarcerated party has received adequate notice of the proceedings...”).

proceedings affecting one of their most fundamental interests, their children. Actual notice to parents – whenever possible – is also desirable because if the parents are present at the hearing, the court and parties can also evaluate whether an extra-judicial solution– such as a short term parental power of attorney pursuant to MCL 700.5103-- is preferable to a guardianship under a family’s specific circumstances.

Based on recommendations from the Probate and Estate Planning Council, and supported by the Representative Assembly of the State Bar of Michigan, we recommend one technical change (see attached revision) to MCR 5.402(C). This change ensures that as long as the parent(s) of a minor subject to the guardianship can be located, personal service is made both on the parent(s) and the minor. The proposed language in ADM 2005-12 could be interpreted as authorizing service on either the child or the parent, which we do not believe was anyone’s intention.

Temporary Guardianship Expiration Date

The proposed changes to MCR 5.403(B) in ADM 2005-12 require that the Probate Court schedule ex parte guardianships for an automatic review hearing within 56 days. This does not interfere with the court’s statutory ability to appoint temporary guardianships for up to 6 months. The proposed rule merely ensures that if the court finds the need to issue a temporary guardianship ex parte, that parents have an opportunity for notice and review of the guardianship in a timely fashion. It also authorizes the petitioner (or Probate Court) to use alternative service, if the parent cannot be located, or if personal service was unsuccessful.

After discussions with the MPJA, the Bar is persuaded that because the majority of temporary guardianships are uncontested, there may be a valid alternative to an automatically mandated review hearing. Under this approach, a parent is informed of the parent’s right to object to an ex parte temporary guardianship, and the process by which to file an objection, which should be heard within 14 days of the objection. This approach, which is similar to the method by which parents may object to proposed orders of the Friend of the Court, is reflected in the alternative revision to MCR 5.403(B) and 5.403(D), which are attached. It also assumes that before a guardianship could continue beyond 6 months, the Court would have to schedule a regularly noticed hearing pursuant to MCL 700.5213(1) and (2).

The Bar would be satisfied either by the proposed rule as published or by this alternative approach. However, in either case we believe that the process has validity only if the petitioner or court attempts personal service on a parent prior to using regular mail.

Proof of Service in Ex-Parte Guardianship Proceedings - MCR 5.104 (B) and (D)

We agree with the MJPA that any requirements concerning proof of service in guardianship proceedings involving minors need not be included in the general probate rule concerning service. Accordingly, in the attached proposed revision, language concerning service has been moved to sections 5.403(B) and 5.403(D), which deal with the notice and procedure requirements only for guardianships involving minors.

Good Cause on the Record MCR 5.104(B)

We agree with the MJPA that the language regarding good cause on the record could be simplified, and have attached an alternative version of MCR 5.403(B). Since some courts have, in practice, adopted a very broad definition of “good cause,” we strongly recommend that the Court Rule or comments to the Court Rule include some additional definition of the circumstances that may justify shortening or eliminating notice. We have suggested that the petitioner should show some real harm to the minor if a guardianship issues without notice. Some examples of how a minor might be harmed due to delay include situations where the minor would be unable to attend school, or unable to receive necessary medical care until a guardian could obtain insurance for the child.

For the State Bar of Michigan:

Terri L. Stangl

Member, Committee on Justice Initiatives

Chairperson, Justice Policy Initiatives

(989) 755-3120 tstangl@ccj-mi.org

Note: Insertions to current court rules are underlined. Deletions are struck out.

1. MCR 5.104 (A) No change to current court rules.

2. MCR 5.402 (C) Responsibility for Giving Notice; Manner of Service. The petitioner is responsible for giving notice of hearing. Regardless of statutory provisions, an interested person may be served by mail, by personal service or by publication when necessary; however, unless another method of service is specifically permitted in the circumstances, notice of the initial hearing must be served personally both on if the person who is the subject of the petition if that person is 14 years of age or older, notice of the initial hearing must be served on the person personally unless another method of service is specifically permitted in the circumstances, and on that person's parent, if the parent can be located.

3. MCR 5.403(B) Notice of Hearing. Minor. ²

For good cause stated on the record, the court may shorten the period for notice of hearing or may dispense with notice of a hearing for the appointment of a temporary guardian of a minor, except that the minor shall always receive notice if the minor is 14 years of age or older. Good cause shall be limited to situations where the petitioner can show that the minor would suffer harm if a guardian is not appointed prior to the date on which a hearing would otherwise be scheduled. Any temporary guardianship that is issued ex parte shall state (1) that the guardianship is temporary and issued without notice, (2) that the parent may object to the order, (3) the procedure for filing an objection and (4) the time and date of the next hearing. When relief is requested ex parte, the petition and any relief granted must be served on interested parties as soon as possible, but no later than 60 days after the ex parte hearing.

² Suggested language to be included in the Rule's comments: "Some examples of how a minor might be harmed due to delay include situations where the minor would be unable to attend school, or unable to receive necessary medical care until a guardian could obtain insurance for the child."

4. MCR 5.403(D)**(D) Temporary Guardian for Minor**

(1) *Prior to Appointment of Guardian.* If necessary during the proceedings for the appointment of a guardian for a minor, the court may appoint a temporary guardian after a hearing at which testimony is taken. Where a petition for appointment of a limited guardian has been filed, the court, before the appointment of a temporary guardian, shall take into consideration the limited guardianship placement plan in determining the powers and duties of the parties during the temporary guardianship. The petitioner or the Court shall serve the initial petition and temporary ex parte order on the minor's parents by personal service. If a parent cannot be located through personal service within 21 days, service may be by first-class mail to the parent's last known address or by publication, or by such means as directed by the court under MCR 5.105(A)(4)(b). If a parent objects to a temporary ex parte guardianship, a hearing shall be held as soon as possible, and in no event later than 14 days after the objection is filed.

Note: Insertions to ADM 2005-12 are underlined. Deletions are struck out.

1. MCR 104 - Retain current court rule and not the ADM 2005-12 version.

2. MCR 5.402 (C) Responsibility for Giving Notice; Manner of Service. The petitioner is responsible for giving notice of hearing. Regardless of statutory provisions, an interested person may be served by mail, by personal service or by publication when necessary; however, ~~if the parent of a minor can be located, or if a~~ unless another method of service is specifically permitted in the circumstances, notice of the initial hearing must be served personally both on the person who is the subject of the petition if that person is 14 years of age or older, notice of the initial hearing must be served on the parent or person personally unless another method of service is specifically permitted in the circumstances, and also on that person's parent, if the parent can be located.

3. MCR 5.403(B) Notice of Hearing. Minor. ³

For good cause stated on the record, the court may shorten the period for notice of hearing or may dispense with notice of a hearing. ~~for the appointment of a temporary guardian of a minor, except that the minor shall always receive notice if the minor is 14 years of age or older. Good cause shall be limited to situations where the petitioner can show the minor would suffer harm if a guardian is not appointed prior to the date on which a hearing would otherwise be scheduled.~~ In an emergency, or at the request of law enforcement, the state agency charged with protection of minors, or that agency's designated agents, the court may proceed without notice of hearing for the appointment of a temporary guardian of a minor, except that the minor shall always receive notice if the minor is 14 years of age or older. If the notice period is shortened or eliminated, the court shall state on the record and indicate on the order what circumstances justify shortening or eliminating notice. Unless the parents of the minor appear at the

³ Suggested language for Comment to this Rule: Some examples of how a minor might be harmed due to delay include situations where the minor would be unable to attend school, or unable to receive necessary medical care until a guardian could obtain insurance for the child.

~~hearing, any order granting a temporary ex parte guardianship after a notice of hearing was shortened or eliminated shall state clearly and prominently that (1) that the order is a temporary, ex parte order, and (2) the date and place for a hearing on the matter to be held within 56 days after the order was issued. The petitioner shall serve the temporary ex parte order, notice of hearing and initial petition for guardianship on each parent by personal service pursuant to MCR 5.105(B)(1). If the parents cannot be located, service, may be by first class mail to each parent's last known address, or by publication as provided in MCR 5.105(A)(3) and 5.105 or by such means as directed by the court under MCR 5.105(A)(4). Any temporary guardianship that is issued ex parte shall state (1) that the guardianship is temporary and issued without notice, (2) that the parent may object to the order, (3) the procedure for filing an objection and (4) the time and date of the next hearing. When relief is requested ex parte, the petition and any relief granted must be served on interested parties as soon as possible, but no later than 60 days after the ex parte hearing.~~

4. MCR 5.403(D)

(D) Temporary Guardian for Minor

(1) Prior to Appointment of Guardian. If necessary during the proceedings for the appointment of a guardian for a minor, the court may appoint a temporary guardian after a hearing at which testimony is taken. Where a petition for appointment of a limited guardian has been filed, the court, before the appointment of a temporary guardian, shall take into consideration the limited guardianship placement plan in determining the powers and duties of the parties during the temporary guardianship. The petitioner or the Court shall serve the initial petition and temporary ex parte order on the minor's parents by personal service. If a parent cannot be located through personal service within 21 days, service may be by first-class mail to the parent's last known address or by publication, or by such means as directed by the court under MCR 5.105(A)(4)(b). If a parent objects to a temporary ex parte guardianship, a hearing shall be held as soon as possible, and in no event later than 14 days after the objection is filed.